FILED
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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 598

THE STATE OF NEW YORK,
Petitioner,

against

JOSEPH CARDINAL, doing business under the name and style of CARDINAL ENGINEERING COMPANY,
Respondent.

REPLY BRIEF, SUPPORTING PETITION FOR CERTIORARI

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REPLY BRIEF

The Respondent's Brief, received on February 27 by mail, advances four reasons against the application for certiorari. A brief reply will be made to each of them.

A

The State did not intend that its terminology be confusing. Upon its Petition as a whole it should be clear that it seeks to review a "final judgment" rendered by the Court of Appeals of New York State.

B

The issue of the timeliness of the State's application depends upon understanding the chronology of a series of judicial acts. The State has no wish that they be confused by the labels used for them. In its Petition it used the terminology customarily used by a New York practitioner but if the facts are made clear the terminology does not matter.

The most significant judicial act of the Court of Appeals of New York State for present purposes probably was not the announcement of its decision but the issuance of its remittitur. That judicial act is similar to the "Order for Mandate" of the Second Circuit Court of Appeals. The significance of such an order for present purposes is discussed in *Comm'r* v. *Estate of Bedford*, 325 U. S. 283 (1945).

The remittitur in the present litigation was issued by the Court of Appeals on the same date that it announced its decision, which was July 15, 1952 (R. 171-172).

The finality of that judicial act of July 15, whether it inhered in the decision or the remittitur, became doubtful

when the Court of Appeals entertained an application for reargument. Such an application "tolls the running of the three months period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties". *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942) 266. That uncertainty ended October 9 when the Court of Appeals denied reargument.

The State will argue on a subsequent page that Cardinal's application for amendment of the remittitur to provide for interest introduced another uncertainty into the "judgment" of July 15. Alternatively, suppose that it did not and hence October 9 is the date of the "final judgment". Ninety-three days thereafter, on January 10, 1953, the State's representative wrote the Clerk of this Court, asking how the State should present an application for extension of time within which to apply for a writ of certiorari. That form of relief was pursued diligently and Mr. Justice Jackson on January 19 signed an order extending time to March 9 "provided the time has not already expired".

We infer that there was a double or alternative uncertainty preserved for decision by all members of the Court. First, the time significance of the application to amend the remittitur was in doubt. If that question were to be decided according to the State's argument the State had until March 5 without any extension. Second, there was doubt whether the power to extend the time must be exercised within 90 days from the "final judgment" or could be at any time within the total of 150 days which Congress set as the ultimate limitation on a petition for certiorari. Mr. Justice Jackson's order of January 19 means, we suppose, that both questions are undetermined. Probably all we can contribute to decision is a clear understanding of the facts.

The State requests liberality in the decision of one branch or the other of its problem of timeliness, and sees nothing in 28 U. S. C. § 2101 subd. (c) which requires that the power to extend be exercised within the ninety-day or three-month period.

The motion to amend the remittitur which did not toll the running of the three-month period in *Dept. of Banking* v. *Pink* differed from the present one. The motion in the present case was not made by the Petitioner but by Cardinal. It affected the liability imposed upon the State to the amount of $19,571.56, the amount of interest eventually adjudged (R. 176). The application to amend the remittitur disclosed that the "judgment" of the Court of Appeals on July 15 or October 9 was uncertain or indefinite to the extent of the interest involved. At least until December 5, when the Court of Appeals said that the question of interest was for the Court of Claims in the first instance, the State could not know how great an obligation was placed upon it by the "judgment" of the Court of Appeals. There should be no decision that the State was required to elect whether to pay or appeal while the amount of its obligation was substantially uncertain.

We conclude our argument upon this question of timeliness by a reference to the judgment entered in the Court of Claims on December 22 (R. 174-176). The Petition says about this at page 8:

> "The judgment of December 22, 1952, was the first entry in any court of the indebtedness asserted in favor of Cardinal and against the State for the sum of $87,000 and interest having sufficient formality and precision and force to authorize its payment by the State. It was the first and only judgment for the principal sum in litigation which would support process for its collection against a defendant other than the State. It was the first and only judgment for that sum from which an appeal might have been taken consistently with the practice of the State courts."

We find no denial of any of those statements in the Respondent's Brief. Those are facts that should be understood. Even if they are irrelevant for purposes of this Court's practice as decided in 1942 and subsequently the State's predicament cannot be understood without understanding those facts.

We make no argument against the practice as decided in *Dept. of Banking* v. *Pink*. We submit that the State's application is timely if the specific facts controlling it are understood.

C

The argument of the Respondent's Brief under the heading that "no Federal statutes are involved in this litigation" appears to mean that the "immunity" claimed under section 905 of the Longshoremen's and Harbor Workers' Compensation Act was for the benefit of Cardinal and cannot be asserted by his insurer. Respondent cites no decision to that effect and we know of none.

Respondent's Brief, bottom of page 7, says that the State is aggrieved because Cardinal did not assert his defense under § 905. On the contrary the Petition, near the bottom of page 3, says that Cardinal pleaded the defense.

Judge Desmond was not discussing the State's defense of the present claim or any involvement of § 905 when he said that in 1946 and 1947 the Fund "waived all questions except as to the $25,000 alleged limit" (quoted in Respondent's Brief, middle of page 8). The claim was not filed until 1948 (R. 1, 8). The Petition, page 4, says truly that "in the present suit the State has * * * constantly relied on the immunity under 33 U. S. C. § 905". If its defense against the claim had not included that ground the opinions of all the Courts below could have omitted discussion of

American Mutual Liability Ins. Co. v. *Matthews* and many related citations.

D

The State has been held liable to Cardinal for the amount of his settlement with the United States and his expenses therein. This could not have been on the theory that Cardinal was liable to the United States by contract, because the insurance contract excludes such a liability. So it must have been, as stated in the dissenting opinion of Judge Dye (R. 168, quoted in the Petition, bottom of page 9), that Cardinal was liable to the United States under an obligation "imposed by law". As he said further:

> "Everyone agrees that unless there is a liability 'imposed by law' he may not recover, for the indemnity obligation assumed by contract is specifically excluded." (R. 168).

We find in the majority opinion no statement of the issue which is equally quotable to justify the State's two questions, but the opinion as a whole and all the opinions in the case justify them.

March 5, 1953.

Respectfully submitted,

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